No. 09-1455

Supreme Court, U.S.
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In The
Supreme Court of the United States

LAURIE ANCONA REINE,

Petitioner,

v.

HONEYWELL INTERNATIONAL, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION OF RESPONDENT, HONEYWELL INTERNATIONAL, INC.

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QUESTION PRESENTED

1. Whether an employer is entitled to summary judgment on a claim alleging hostile work environment "because of sex" when the undisputed evidence proves that the alleged harasser treated both men and women in a similarly harsh manner, and the claim is based upon a number of alleged offensive comments, the vast majority of which are gender-neutral.

CORPORATE DISCLOSURE STATEMENT

Respondent, Honeywell International, Inc., is a publicly traded corporation under the market symbol HON. There are no parent corporations or publicly held companies owning 10% or more of Honeywell International, Inc.'s stock.

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INTRODUCTION

In her Petition for Writ of Certiorari ("Petition"), Petitioner asserts that the decision of the United States Court of Appeals for the Fifth Circuit is in conflict with this Court's decision in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998). Further, Petitioner manufactures a split among the Circuit Courts of Appeals in an effort to persuade this Court that this matter warrants Supreme Court review. This Court made clear in *Oncale* that direct, comparative evidence was only one of the evidentiary routes a plaintiff may use to prove that harassment was "because of sex." Despite this Court's holding in *Oncale*, Petitioner contends that there is a conflict among the Circuit Courts of Appeals regarding whether a plaintiff asserting a sexual harassment claim is required to produce evidence that she was treated differently than similarly situated male employees in order to succeed on such claim. Respondent, Honeywell International, Inc. ("Honeywell"), strongly disagrees with Petitioner in this regard. There is no circuit split implicated by the Fifth Circuit's decision. The opinion of the Fifth Circuit in this matter is in accord with this Court's opinion in *Oncale* and the decisions of the Circuit Courts of Appeals relied upon by Petitioner.

In framing the issues in her Petition, Petitioner misstates the facts before the Fifth Circuit and attempts to transform Title VII into a general civility code for the American workplace. Petitioner avoids

the fact that she failed to prove under any evidentiary route that the alleged harassment about which she complained was "because of sex." Not only did the undisputed evidence prove that the alleged harasser was equally harsh to men and women, but the vast majority of the alleged offensive comments upon which Petitioner based her claim were gender-neutral. In affirming the district court's grant of summary judgment in favor of Honeywell, the Fifth Circuit's application of Title VII and this Court's precedent, as well as the precedent in the Fifth Circuit, was both straightforward and unremarkable. Thus, the Petition should be denied.

STATEMENT OF THE CASE

In 1994, Petitioner began working as an operator in the Hydrofluoric Acid Unit ("HF Unit") at Honeywell's plant in Geismar, Louisiana. Operators within the HF Unit are assigned to one of four shifts (A, B, C, or D Shift). Each shift has, in order of ascending responsibility, (1) operators; (2) relief backup board operators; (3) backup board operators; and (4) a board operator.

Petitioner reported to Bruce Perque on the A Shift for the first three to six months of her employment. For the next eight years of her employment, Petitioner was assigned to the B Shift, under the supervision of Jim Rogers. Petitioner

admits that she had a good working relationship with both Perque and Rogers.

In approximately June 2002, Petitioner was transferred to the C Shift, where she was supervised by Charlie Moore. As with Perque and Rogers, Petitioner admits that she had no problems with Moore. She worked for Moore on the C Shift for only about one month before she applied for and received a promotion to relief backup board operator on D shift.

Johnny Gautreau is the D Shift supervisor, and Petitioner began reporting to him in July 2002. Gautreau is the only person with Honeywell that Petitioner contends harassed her because of her sex. In support of her claim, Petitioner contends that Gautreau was generally mean and harsh toward her and made approximately 15 inappropriate comments to her during the three years he was her supervisor.[1]

In an attempt to bolster her harassment claim, Petitioner states that "[t]he context of Gautreau's words shows that they [the alleged inappropriate

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[1] On pages 7 and 8 of the Petition, Petitioner suggests that she suffered tangible employment actions as a result of the alleged harassment by Gautreau. However, Petitioner did not assert a *quid pro quo* harassment claim in the courts below. To the contrary, Petitioner only alleged a hostile work environment harassment claim. Indeed, Petitioner only relied on these alleged adverse employment actions in support of her retaliation claim, which was rejected by the courts below. Pet. 7-8. References to the Petition and its Appendix are cited as "Pet. __" and "Pet. App. __," respectively.

comments] were stated to Laurie Reine on a daily basis, while Gautreau was screaming and yelling at her in a condescending manner." Pet. 6. There is no support whatsoever in the record for this. To the contrary, Petitioner testified only to the 15 isolated comments.

In February 2005, Petitioner approached Ron Snell, HF Operations Manager; Aaron Eldridge, Plant Manager; and Terry Samona, Human Resources Manager, to complain about Gautreau's conduct. During her meetings with these individuals, Petitioner complained that Gautreau harassed her by making a series of comments to or about her.

Honeywell conducted an investigation into Petitioner's allegations about Gautreau. Samona was the individual responsible for conducting the investigation. During the course of the investigation, Gautreau admitted that he made two of the approximate fifteen comments complained about by Petitioner. Honeywell informed Gautreau that the allegations were being taken seriously and that they would talk with as many people as necessary to investigate.

At the conclusion of the investigation, Samona and Snell met with Petitioner to discuss Honeywell's findings. During this meeting, Petitioner was given a copy of a written memorandum, explaining that only two of her allegations were substantiated during the investigation, but that Gautreau would be coached concerning his actions. The memo also thanked Petitioner for raising the issues and assured her that

Honeywell would not tolerate any retaliation against her.

In July 2005, following her complaint regarding Gautreau, Petitioner applied for and received a promotion to backup board operator on B Shift. Since then, Petitioner has had only infrequent contact with Gautreau. When asked if Gautreau has made any sexually harassing comments to her since that time, Petitioner did not offer a single one. Instead, Petitioner simply stated that she objects to Gautreau's tone of voice, which she described as "indifferent."

Petitioner continues to work for Honeywell as a backup board operator. Despite the picture she attempts to paint in her Petition that she works in a hostile environment, Petitioner testified in her deposition that she very much enjoys her job and loves going to work.

In September 2006, Petitioner filed suit against Honeywell alleging claims of sexual harassment and retaliation under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e, *et seq*. Honeywell subsequently filed a motion for summary judgment. The motion asserted that the undisputed evidence proved that Petitioner's sexual harassment claim fails as a matter of law because the conduct complained of was (1) not based on sex, and (2) not sufficiently severe or pervasive to alter a term, condition, or privilege of Petitioner's employment. Additionally, Honeywell asserted that it took reasonable steps to prevent and correct promptly any sexually harassing

conduct. The district court held oral argument on Honeywell's motion. At the conclusion of oral argument, the court granted Honeywell's motion. Pet. App. 8-11.

Petitioner appealed the final judgment to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit also held oral argument on Petitioner's appeal. In an unpublished per curiam opinion, the Fifth Circuit affirmed the judgment of the district court on the grounds that, *inter alia*, Petitioner failed to prove that any alleged harassment was "because of her sex." Pet. App. 1-7. Petitioner subsequently filed a petition for rehearing en banc, which the court summarily denied in another per curiam opinion.[2] Pet. App. 13-14.

The Fifth Circuit's decision represents a mere reaffirmation of Title VII precedent regarding a plaintiff's burden in proving a claim of hostile work environment based on sex. There is nothing remarkable about this decision which would warrant Supreme Court review.[3]

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[2] The court treated the petition for rehearing en banc as a petition for panel rehearing.

[3] Honeywell moved for summary judgment on Petitioner's retaliation claim as well. The district court also granted Honeywell's motion for summary judgment on the retaliation claim, and the Fifth Circuit affirmed the judgment. Petitioner does not seek review of the Fifth Circuit's decision affirming dismissal of her retaliation claim.

REASONS FOR DENYING THE PETITION

In a desperate attempt to obtain further appellate review, Petitioner contends that the decision of the Fifth Circuit is in conflict with this Court's decision in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), and implicates a split among the Circuit Courts of Appeals regarding the proper interpretation of *Oncale*. This is a meritless argument, and one which does not justify granting the Petition. There is no inter-circuit conflict. The Fifth Circuit's decision in affirming the district court's grant of summary judgment was entirely consistent with both *Oncale* and the rulings from every other Circuit Court of Appeals regarding the various ways in which a plaintiff may prove that harassment is "because of sex." In reality, the Petition is merely an attack on the decision of the Fifth Circuit based on alleged errors that are factually and legally unsupported. Petitioner fails to present any compelling reason justifying Supreme Court review.

I. This Court Has Already Decided the Issue Upon Which Petitioner Seeks Review.

In the Petition, Petitioner frames the question presented as "[w]hether, in a Title VII hostile work environment case, the Plaintiff is required to prove that male employees were treated differently as an element of the claim." Pet. i. However, this Court previously answered this question in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998).

Thus, there is no unsettled question of federal law to be decided by this Court, and the Petition should be denied.

It is well settled that a plaintiff must prove that the harassment was "because of sex" in order to establish a case of hostile work environment based on sex. 42 U.S.C. § 2000e-2(a)(1). In *Oncale,* the plaintiff was part of an eight man ship crew. The plaintiff could not show that any female crew were treated differently since there were none. Nevertheless, this Court found that evidence that the plaintiff had been sexually harassed was sufficient to support his Title VII claim because the harassment was **because of his sex**. In support of its holding, this Court explained that "comparative evidence about how [an] alleged harasser treated members of both sexes" is one "evidentiary route" to prove discrimination, but a harasser's "sex-specific and derogatory terms" can do the same. *Oncale,* 523 U.S. at 80-81.[4] However, as emphasized by this Court, "whatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted '**discriminat[ion]** . . . because of

[4] A plaintiff may also prove that harassment is because of sex by showing that the "alleged harasser made explicit or implicit proposals of sexual activity." *Oncale,* 523 U.S. at 80. However, this evidentiary route is not at issue in the present case, as Petitioner does not allege that Gautreau made any explicit or implicit proposals of sexual activity.

. . . sex.'" *Id.* at 81 (emphasis in original) (citation omitted).

This Court made clear in *Oncale* that direct, comparative evidence was only one of several ways in which a plaintiff can prove that harassment was "because of sex." Accordingly, the Petition should be denied, as this Court has already decided the question upon which Petitioner seeks review.

II. The Decision of the Fifth Circuit Is Consistent With *Oncale*.

In an attempt to persuade the Court that the decision of the Fifth Circuit is in conflict with *Oncale*, Petitioner relies upon a single quote from the court's per curiam opinion and maintains that she was "required to prove that she was treated differently from similarly situated male employees as an element of the claim." Pet. 9-10. However, Petitioner's contention is baseless. A full reading of the opinion makes clear that the Fifth Circuit did not limit Petitioner to direct, comparative evidence in proving her claim. To the contrary, the Fifth Circuit considered Petitioner's claim under both evidentiary routes set forth in *Oncale*. However, Petitioner failed to prove that the alleged harassment by Gautreau was "because of her sex" under either evidentiary route.

In concluding that Petitioner failed to prove that the harassment was "based on sex," the Fifth Circuit correctly cited the law as follows:

> The "critical issue" in determining whether workplace activities constitute harassment based on sex is "whether members of one sex are exposed to disadvantageous terms and conditions of employment to which members of the other sex are not exposed." *Oncale*, 523 U.S. at 80. "Title VII is not a shield against harsh treatment at the workplace; it protects only in instances of harshness disparately distributed." *Jackson v. City of Killeen*, 654 F.2d 1181, 1186 (5th Cir. 1981).

Pet. App. 4.

The undisputed evidence proved that the vast majority of the actions about which Petitioner complained were gender-neutral, and not "sex-specific and derogatory." Presumably recognizing that the vast majority of the alleged inappropriate comments were gender-neutral, Petitioner does not list such comments once in the Petition. Instead, Petitioner makes haphazard references to select portions of some of the alleged comments. The following are the 15 comments allegedly made by Gautreau:

- "When are you going to do something with your mustache? You need to do something with your mustache."
- Petitioner's hair was too wild.
- "I [Petitioner] asked the stupidest, goddamn questions."

- "You need to get your fucking priorities straight. You've been here ten years. . . . You're always fucking with that EVS."
- In regard to Petitioner placing a bottle of Palmolive soap in a locker, Gautreau allegedly commented, "Why are you doing that? You're always doing things on your own. Why don't you leave that alone?"
- In regard to Petitioner not responding on the radio, Gautreau allegedly stated "Laurie's in oblivion."
- Petitioner allegedly overheard Gautreau state that "somebody's not a team player."
- In regard to a conversation regarding Honeywell's Green Light Safety Award, Gautreau allegedly told Petitioner, "You're just too comfortable, they're [Honeywell] fucking cheap."
- Gautreau allegedly referred to Petitioner as "emotional."
- "Laurie, you're too slow."
- Gautreau allegedly said, "Laurie, you need to get out of the control room and go make a first round and not have coffee."
- In regard to Petitioner being called out for overtime, Gautreau allegedly commented, "What's the matter? She [Petitioner] don't want to come out here? Well, if she don't want to come out here,

> we'll just get somebody else out here that does."
>
> - In regard to an incident where Gautreau allegedly told Petitioner to "get in the truck" and as a response Petitioner said, "I'm not getting in the truck with you because I'm tired of your harassment." Gautreau allegedly replied that "if you don't get in the truck right now, I'm sending you home."
>
> - Gautreau allegedly commented that Petitioner "act[ed] like that computer's hers." . . . "Well it looks like if you don't have" – "if you can't tell Juan to get off the computer, you might not be able to handle the board by telling people what to do."
>
> - In response to Petitioner asking for vacation, Gautreau allegedly commented in an abusive tone, "Well, did you talk to Jim?"

Petitioner further claims that Gautreau generally spoke to her in a hard, sarcastic and insulting manner.

In the Petition, Petitioner also suggests that she was subjected to physical harassment as well as verbal harassment. Pet. 6. Although Petitioner alleged that Gautreau once blocked her in a doorway and stated, without touching her, "Look at me," there is no support in the record that Petitioner was subjected to any physical harassment. Indeed, Petitioner admitted in her deposition that Gautreau

never touched her in any offensive or unwelcome manner.

The district court carefully considered all of the actions Petitioner claimed Gautreau directed toward her and, with the possible exception of the mustache comment, properly found them to be gender-neutral. Pet. App. 9-10. Likewise, the Fifth Circuit correctly recognized that "only a few of these [comments] made any reference to her sex." Pet. App. 2.

Since the actions about which Petitioner complained were clearly not "sex-specific and derogatory," the only other evidentiary route advanced by Petitioner was direct, comparative evidence about how Gautreau treated men and women in the workplace. In attempting to prove harassment based on sex via direct, comparative evidence, the Fifth Circuit correctly stated that Petitioner "bore the burden to prove that Gautreau's behavior towards female employees was more severe than his treatment of males in the same position." Pet. App. 5. However, as recognized by the Fifth Circuit, Petitioner failed to satisfy her burden in this regard, as "[t]estimony from numerous employees – male and female – demonstrates that Gautreau was an 'equal opportunity' harasser." Pet. App. 5. Accordingly, the Fifth Circuit properly found that, under the circumstances of this case, "[w]hen the conduct is equally harsh towards men and women, there is no hostile work environment based on sex." Pet. App. 5.

The Fifth Circuit's decision in affirming the district court's grant of summary judgment was entirely consistent with *Oncale*. Thus, the Petition should be denied.

III. There Is No Circuit Split Which Warrants Further Appellate Review.

Petitioner asserts that the decision of the Fifth Circuit implicates a circuit split regarding "[t]he permissible methods under which female employees may bear their burden of proof of gender-based harassment, where the harasser has also harassed members of his same sex." Pet. 10. However, there is no such circuit split.

Petitioner relies on five Circuit Courts of Appeals decisions in support of her effort to persuade this Court that the decision of the Fifth Circuit is in conflict with that of the other Circuit Courts of Appeals that have addressed the issue of whether a plaintiff is required to offer direct, comparative evidence as an element of a discrimination claim, including a claim of harassment. However, Petitioner is incorrect. As an initial matter, as discussed above, this Court already decided this issue in *Oncale*, and the Fifth Circuit's decision is in accordance with *Oncale*. In addition, the Fifth Circuit's decision is consistent with that of the other Circuit Courts of Appeals.

In line with *Oncale*, the Second, Fourth, Seventh and Eighth Circuits have all indicated that

comparative evidence is not the exclusive means by which a plaintiff may establish unlawful discrimination, including harassment. *See Lewis v. Heartland Inns of America, LLC*, 591 F.3d 1033, 1040-41 (8th Cir. 2010); *Back v. Hastings on Hudson Union Free School Dist.*, 365 F.3d 107, 121-22 (2d Cir. 2004); *Bryant v. Aiken Regional Medical Centers Inc.*, 333 F.3d 536, 545-46 (4th Cir. 2003); *Young v. Warner-Jenkinson Co., Inc.*, 152 F.3d 1018, 1022 (8th Cir. 1998); *McDonnell v. Cisneros*, 84 F.3d 256, 260 (7th Cir. 1996). The Fifth Circuit has also previously recognized that a plaintiff is not required to offer direct, comparative evidence in order to succeed on a sexual harassment claim. *See La Day v. Catalyst Technology, Inc.*, 302 F.3d 474, 478 (5th Cir. 2002). Indeed, in *Butler v. Yselta Indep. Sch. Dist.*, 161 F.3d 263 (5th Cir. 1998), the Fifth Circuit noted that "presumably an individual could be guilty of sexually harassing both men and women," thus negating Petitioner's suggestion that comparative evidence is an essential element of a plaintiff's sexual harassment claim in the Fifth Circuit. *See Butler*, 161 F.3d at 270

The decision of the Fifth Circuit in the instant matter is consistent with its prior decisions as well as the decisions of the Second, Fourth, Seventh and Eighth Circuits. Despite Petitioner's argument to the contrary, the Fifth Circuit did not require Petitioner to prove that she was treated differently from similarly situated male employees as an element of her sexual harassment claim. Recognizing that "only

a few of these [comments] made any reference to her sex," the court correctly evaluated Petitioner's claim under the only other evidentiary route advanced by Petitioner in this case – direct, comparative evidence. The Fifth Circuit properly found that Petitioner failed to prove that the alleged harassment by Gautreau was "because of her sex" under this evidentiary route, as the undisputed evidence proved that Gautreau was an equally harsh supervisor to men and women.

Apparently, Petitioner is actually relying on a purported conflict within the Seventh Circuit in an attempt to obtain further appellate review of her case. However, an alleged conflict within the Seventh Circuit has no bearing on the instant Petition, which concerns a decision of the Fifth Circuit that is consistent with the decisions of this Court, the Circuit Courts of Appeals, and its own decisions. On page 17 of the Petition, Petitioner discusses *McDonnell v. Cisneros*, 84 F.3d 256, in which the Seventh Circuit rejected the defendant's contention that there could be no discrimination on grounds of sex because the harassment was impartially directed against the male and female employee.[5] *McDonnell*, 84 F.3d at

[5] The court in *McDonnell* noted that dicta in some cases supported the argument that a harassment claim necessarily fails when the alleged harassment is directed against males and females. *McDonnell*, 84 F.3d at 260. However, all of the cases cited by the court predate this Court's decision in *Oncale*. *See Roumsky v. Bryan Indep. School Dist.*, 80 F.3d 1006, 1016 (5th Cir. 1996); *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 620 (6th Cir. 1986); *Henson v. City of Dundee*, 682 F.2d 897, 903-04

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260). Petitioner then suggests that the Seventh Circuit held to the contrary in a subsequent decision, *Moranski v. General Motors Corporation*, 433 F.3d 537 (7th Cir. 2005).

Moranski is distinguishable from *McDonnell*, as *McDonnell* involved claims of sexual harassment, whereas *Moranski* concerned claims of religious discrimination, not harassment. In addition, the excerpt from *Moranski* cited by Petitioner on page 18 of the Petition comes from a prior decision of the Seventh Circuit, *Holman v. State of Indiana*, 211 F.3d 399 (7th Cir. 2000). In *Holman*, the court rejected the plaintiffs' claims on the grounds that the plaintiffs failed to prove that the complained of conduct was **discrimination** because of sex, as the alleged harasser treated both sexes the same. *Holman*, 211 F.3d at 403-04. Like the instant Petition, plaintiffs sought further appellate review of the Seventh Circuit decision from this Court on the grounds that the decision conflicted with the rulings of other Circuit Courts of Appeals regarding whether Title VII covers the "equal opportunity" harasser. Notably, this Court denied plaintiffs' petition for writ of certiorari. *Holman v. Indiana*, 531 U.S. 880 (U.S. 2000).

In short, there is no circuit split. The Fifth Circuit's decision to affirm the district court's grant of summary judgment in favor of Honeywell was well

(11th Cir. 1982); *Barnes v. Costle*, 561 F.2d 983, 990 n. 55 (D.C. Cir. 1977).

grounded in law and consistent with the decisions of the other Circuit Courts of Appeals. Thus, the decision below affords no basis for granting the Petition.

IV. The Decision of the Fifth Circuit Does Not Involve a Question of Recurring Importance.

Petitioner states that this case implicates a question of "recurring importance" in the lower courts and "risks treating similarly situated female employees differently, depending on the location of their workplace." Pet. 19. Petitioner's statements have no basis in reality.

Petitioner's entire argument is based on the incorrect assumption that there is a division of authority among the Circuit Courts of Appeals. As shown above, there is no such circuit split. This Court made clear in *Oncale* that there are several ways in which a plaintiff can show that harassment is "because of sex," only one of which is direct, comparative evidence. In accordance with *Oncale,* the Circuit Courts of Appeals, including the Fifth Circuit, have not limited plaintiffs to direct, comparative evidence in proving their claims of discrimination, including harassment. *See Lewis,* 591 F.3d at 1040-1041; *Back,* 365 F.3d at 121-22; *Bryant,* 333 F.3d at 545-46; *La Day,* 302 F.3d at 478; *Young,* 152 F.3d at 1022; *McDonnell,* 84 F.3d at 260; *see also Butler,* 161 F.3d at 270.

Petitioner further asserts that supervisors, Human Resources personnel, and other employees need more guidance "so that they can conform their conduct in the workplace to consistent and clear principles of law." Pet. 19-20. Petitioner's argument in this regard is specious, as Title VII and this Court have made clear what conduct is unlawful. In particular, Title VII makes clear what conduct is prohibited – discrimination "because of sex." 42 U.S.C. § 2000e-2(a)(1). In addition, this Court has established clear principles of law regarding the conduct prohibited by Title VII. In *Oncale*, this Court emphasized that "Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at **discrimination** because of sex." *Oncale*, 523 U.S. at 80 (emphasis in original). This Court further explicated what it meant by "discrimination" in sexual harassment cases: "The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which other members of the other sex are not exposed." *Id.* at 80 (quotations and citation omitted). This Court has also made clear that Title VII does not set forth "a general civility code for the American workplace." *Id.* at 80; *see also Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998). Title VII is only violated "[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working

environment." *Oncale*, 523 U.S. at 78 (quotations and citation omitted).

Finally, Petitioner's suggestion that the Fifth Circuit's per curiam opinion "risks treating similarly situated female employees differently, depending on the location of their workplace" is insupportable. Pet. 20. Regardless of where Petitioner worked, the result would be the same – Petitioner failed to show that any alleged harassment was "because of sex." The vast majority of the comments about which Petitioner complained, while maybe generally offensive, were not gender-related. In reality, Petitioner is attempting to convert Title VII into a general civility code for the workplace by creating a cause of action for every employee who has a harsh supervisor. Thus, according to Petitioner's proposed model, those employees with a harsh supervisor would have a cause of action for harassment despite the absence of any evidence that such harassment was "because of sex." In other words, Petitioner is actually advocating that the Court eliminate the third essential element of a hostile work environment claim (*i.e.*, that the complained of conduct was "because of sex") in cases involving a harsh supervisor. Petitioner's contention in this regard is negated by the language of Title VII and the decisions of this Court, which make clear that only discrimination "because of sex" is prohibited.

V. The Undisputed Evidence Proved That Gautreau Was Equally Harsh to Men and Women.

Petitioner's contention that Gautreau's conduct was more offensive to female employees than male employees is not supported by the evidence. To the contrary, the undisputed evidence proved that Gautreau was equally harsh to men and women, and consequently, the Fifth Circuit properly affirmed summary judgment. The court specifically found that Petitioner "provided deposition testimony that Gautreau displayed similarly demeaning behavior towards all of his subordinates, including several white males." Pet. App. 2. Accordingly, the Fifth Circuit correctly held that Petitioner failed "to prove that Gautreau's behavior towards female employees was more severe than his treatment of males in the same position." Pet. App. 5.

The testimony of Petitioner and the other witnesses she offered in support of her claim demonstrate that Gautreau was equally harsh to numerous men. Petitioner claims that Gautreau "brutalized" Donnie Ballard. She testified that Cordell Johnson, another male, is "still battered" because of the way Gautreau allegedly treated him. She also testified that Gautreau abused another

male, Scott Sininan, so much that Sininan "would stay in the maintenance shop like a dog."[6]

The testimony of Petitioner's witnesses also proved that Gautreau's harsh treatment was not gender related. In fact, their testimony proved that many of them felt they were treated poorly by Gautreau in exactly the same way as Petitioner. For example, Petitioner offered the testimony of Ernest Dvorak, a male employee who retired in 1999, four years before Petitioner began working on Gautreau's shift. In giving his opinion as to how Gautreau treated him and Petitioner, Dvorak stated that Petitioner apparently went through "a hell similar to what I had gone through."

Petitioner also relied upon the testimony of Cordell Johnson, another male employee who had problems with Gautreau. Johnson's testimony was also clear that he felt Gautreau treated everyone harshly regardless of sex. He testified as follows:

> Q. Okay. And you said there were several other people who have experienced problems with him. Who else experienced problems with him?
>
> A. To put it bluntly, you know, I think there is [sic] several people. I can't say person for person, but **he's that way to just**

[6] Jennifer Wilson, one of plaintiff's witnesses, described Sininan as Gautreau's "whipping boy."

> **about everybody out there, you know**. Excuse my French, but he is an asshole.

Johnson went on to discuss several male employees who left the D shift because of apparent problems with Gautreau.

Perhaps more significantly, Johnson was specifically asked if Gautreau treated women more harshly than men, and he testified that Gautreau treated them the same:

> Q. Okay. Do you have any way to know about the severity of and frequency of the actions by Mr. Gautreau towards women operators? For example, we have two women operators, I understand that have worked out there on Mr. Gautreau's shift. Do you have any way of comparing the problems they have experienced with Mr. Gautreau to the problems that, for example, white males have experienced with Mr. Gautreau?
>
> . . . .
>
> A. From my standpoint, it's been on an even keel. **He's – the way he is with everybody.**
>
> Q. All right. And what about black males and white males, does he treat those people even.
>
> A. Once, again, I say he's the way he is with everybody.

> Q. Is there anything that is specific that you can give us that you haven't given us about that? You said, "the way he is with everybody." Is it just the drill sergeant forceful demanding –
>
> A. Yeah.
>
> Q. – or is there more examples that you can give to us?
>
> A. No. It's just like the forceful drill sergeant, you know, demanding. That's the best I can describe.

While Petitioner objects to Gautreau's tone of voice, Johnson further testified that he observed Gautreau speaking to "numerous" white males in a condescending manner.

In short, Petitioner presented a good deal of evidence from various witnesses, but the evidence only proved that Gautreau was equally harsh towards males and females. Courts have uniformly held that allegedly rude conduct and unfair criticism do not constitute unlawful harassment under Title VII. *See Breeding v. Arthur J. Gallagher & Co.*, 164 F.3d 1151, 1159 (8th Cir. 1999) ("[Plaintiff] felt that she was unfairly criticized and yelled at, but these conditions, while not desirable, do not amount to actionable harassment on the basis of age."); *Gross v. Burggraf Construction Co.*, 53 F.3d 1531, 1543, 1545-46 (10th Cir. 1995) (holding that the following allegations did not constitute sexual harassment because conduct was not based on sex: (1) supervisor yelled

"what the hell are you doing? Get your ass back in the truck and don't get out until I tell you" at plaintiff; (2) supervisor referred to plaintiff as "dumb"; and (3) supervisor "embarrassed and humiliated" plaintiff by reprimanding her in front of other employees).

In an effort to convince this Court that the Fifth Circuit was wrong in finding that Gautreau was equally harsh to men and women, Petitioner maintains that she suffered a psychological injury as a result of the alleged harassment by Gautreau, and there is no evidence that male employees were adversely affected by Gautreau's harassment. Pet. 21-22. However, any purported psychological injury suffered by Petitioner is irrelevant to whether any harassment was "because of sex." The impact of any purported harassment on Petitioner is only relevant to whether such harassment was sufficiently severe or pervasive to constitute unlawful harassment, an element which Petitioner does not address in the Petition.[7] In addition, as shown above, the undisputed

[7] As mentioned, Honeywell argued in its motion for summary judgment that Petitioner could not prove that any alleged harassment by Gautreau was "because of sex", or that the complained of conduct was severe or pervasive. Although the district court concluded that the complained of conduct was not gender-based, it further found that, even if it considered that "one or more of these comments as somehow gender related, this is not sufficient to characterize the work environment as severe or – characterize the conduct at least as severe or pervasive such that the work environment was hostile." Pet. App. 10. In light of its finding that Petitioner failed to prove that the complained of

(Continued on following page)

evidence proved that male employees were also affected by Gautreau's alleged harassment.

Based on the evidence presented by Petitioner and her witnesses, the Fifth Circuit correctly found that Petitioner failed to prove that any alleged harassment was "because of sex." Petitioner's disagreement with the court's holding in this regard does not justify the grant of the Petition in this case.

VI. The Undisputed Evidence Proved That Gautreau's Comments Were Gender-Neutral.

Petitioner contends that she presented genuine issue of material facts as to gender-based harassment based on the use of "sex-specific and derogatory terms" by Gautreau. However, the undisputed evidence proved that the vast majority of Gautreau's comments were gender-neutral.

As discussed above, only one of the alleged actions by Gautreau can even arguably be considered gender related – his comment about plaintiff having a mustache. The remaining alleged actions by Gautreau were gender-neutral and, at most, can only be considered as demeaning or criticizing of plaintiff's work. Such gender-neutral actions are not actionable under Title VII. *See Breeding*, 164 F.3d at 1159;

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conduct was "because of sex," the Fifth Circuit did not need to reach the issue of whether such conduct was severe or pervasive.

Gross, 53 F.3d at 1543, 1545-46; *Townsend v. Harvey*, 2006 WL 2605710, *6-7 (W.D. Tex. 9/11/06).

In light of the fact that the vast majority of these comments are gender-neutral, Petitioner relies heavily on the declaration of Leroy George in an effort to show that any harassment was "because of sex." However, George never personally observed Gautreau interacting with Petitioner, and thus, George's declaration does nothing to prove that Gautreau's alleged harassment of Petitioner was because of her sex.[5]

Petitioner also relies upon numerous alleged statements made to other people, that occurred at times that she was not even present, and that involved people other than Gautreau. For example, on page 6 of the Petition, Petitioner suggests that Gautreau called her a "bitch." However, there is no record evidence that Gautreau ever called Petitioner or any other employee a "bitch" in Petitioner's presence. To the extent Gautreau made offensive comments in the presence of other women, Petitioner cannot use such alleged offensive comments to support her harassment claim. *See Septimus v. University of Houston*, 399 F.3d 601, 612 (5th Cir. 2005) (noting that the plaintiff "did not personally

[5] The majority of the statements in George's affidavit are irrelevant, constitute inadmissible hearsay and are nothing more than Petitioner's attempt to offer other acts of alleged harassment.

experience most (if not all) of the conduct complained of by the other women"); *see also Cowan v. Prudential Ins. Co. of America*, 141 F.3d 751, 757 (7th Cir. 1998) ("a plaintiff cannot rely on what another plaintiff claims to be offensive"); *Ngeunguntr v. Metropolitan Life Ins. Co.*, 146 F.3d 464, 467 (7th Cir. 1998); *Hirase-Doi v. U.S. West Communications Inc.*, 61 F.3d 777, 782 (10th Cir. 1995); *Biggs v. Nieuwoonger Co., Inc.*, 897 F.Supp. 483, 485 (D. Ore. 1995).[9]

Petitioner failed to offer any evidence to prove that Gautreau's alleged conduct toward her was because of her gender. The district court properly found that all of the actions Petitioner claimed Gautreau directed toward her, with the possible exception of the mustache comment, were gender-neutral. Based on this same evidence, the Fifth Circuit also correctly found that "only a few of these [comments] made any reference to her sex."

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[9] As a further example, on page 7 of the Petition, Petitioner states that Gautreau said that "Laurie Reine would have sex with a gorilla." However, that comment was purportedly made by an indentified man in the control room, and not Gautreau, and Reine did not personally hear the alleged comment. Ernest Dvorak, a former employee who also testified about having problems with Gautreau, is the individual who allegedly overheard the gorilla comment.

CONCLUSION

In summary, there are simply no circuit splits or important unsettled legal questions present in this case. The Fifth Circuit's decision affirming the grant of summary judgment in favor of Honeywell was well reasoned and based upon the applicable statute, existing precedent and the facts. In particular, Petitioner failed to prove that the complained of conduct was "because of sex." The undisputed evidence proved that both men and women complained of equally harsh treatment by Gautreau. Moreover, the vast majority of Gautreau's conduct about which Petitioner complained was gender-neutral. There is no reason to review the Fifth Circuit's decision and the Petition should be denied.

Respectfully submitted,

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